Supreme Court, U.S.
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No. 93-1032

In the

SUPREME COURT
OF THE UNITED STATES

October Term, 1993

JOHN M. RATELLE, WARDEN OF THE
R.J. DONOVAN CORRECTIONAL FACILITY
OF THE STATE OF CALIFORNIA,
Petitioner

v.

JAMES EDWARD CRAWFORD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL E. LUNGREN, Attorney General of the State of California
GEORGE WILLIAMSON, Chief Assistant Attorney General
CAROL WENDELIN POLLACK, Senior Assistant Attorney General
DONALD E. DE NICOLA, Supervising Deputy Attorney General
ARTHUR H. AUERBACH
Deputy Attorney General
LINDA C. JOHNSON*
Supervising Deputy Attorney General
300 South Spring Street
Suite 500
Los Angeles, California 90013
Telephone: (213) 897-2255
ATTORNEYS FOR PETITIONER
*Counsel of Record

QUESTION PRESENTED

When a criminal defendant makes a morning-of-trial request for self-representation, California holds that it is within the trial court's discretion to grant after considering all of the circumstances. The Ninth Circuit Court of Appeals holds that the request must be granted unless the State can prove the defendant subjectively made the request for the purpose of delay.

The question presented is:

Does the Constitution, in fact, prohibit the states from considering all of the circumstances in ruling on a request for self-representation?

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OPINION BELOW

The unpublished opinion, James Edward Crawford v. John Ratelle, Warden, No. 92-55702, is attached as Appendix A.

JURISDICTION

The date of the judgment of the Ninth Circuit Court of Appeals' opinion, which petitioner seeks to have reviewed is August 20, 1993. *See* App. F.

Petitioner's application for an extension of time to file a petition for writ of

certiorari was granted by this Court on November 19, 1993, extending the time to and including December 18, 1993.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Title 28 of the United States Code, section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On June 12, 1989, Crawford's case was called for trial. He was represented by Ms. Leslie Falick from the Los Angeles County Public Defender's Office. Ms. Falick made two pre-trial motions: one to sever two counts of assault with a deadly weapon upon a peace officer from the other charges, and another one to strike a prior serious felony conviction on the basis of constitutional invalidity. The court denied both motions after which the following colloquy occurred:

> MS. FALICK [Defense Counsel]: Mr. Crawford has just informed me that he was unhappy that the motions that I ran were denied by this Court. So he thinks he can do a better job than I can and he wants to go pro per.
>
> Is that what you want to do, sir, you want to go pro per?

[CRAWFORD]: Yes.

MS. FALICK: You want to represent yourself without any lawyer at all?

[CRAWFORD]: Yes.

THE COURT: Today is the date set for trial. Court will find that motion not being made timely, the motion will be denied.

See App. G.

Thereafter, the matter was trailed for a witness check and was subsequently transferred to another court. However, due to a trial already in progress in that courtroom, Crawford's trial was continued to June 16, the date jury trial actually commenced. *See* App. G.

Following the jury trial, Crawford was found guilty of two counts of first degree robbery, three counts of second degree robbery, one count of attempted robbery, and one count of grand theft. The jury further found to be true the allegation that all of

the offenses were committed with the use of a knife. Crawford waived jury trial on the issue of his prior conviction, which was found to be true. He was sentenced to state prison for 17 years, 8 months.
See App. E, G.

The California Court of Appeal, Second Appellate District, Division Two, affirmed the conviction. The appellate court found that the trial court did not abuse its discretion in denying the motion for self-representation because: "the motion was made on the date set for trial, the case was a complex matter involving numerous counts, and a continuance would have been required to enable appellant to prepare his defense." *See* App. G. Crawford subsequently filed a petition for review in the California Supreme Court, which was denied.

Crawford then filed a petition for writ of habeas corpus in the United States District Court, Central District of

California, alleging he had been denied his constitutional right to self-representation in the trial court. On December 19, 1991, the magistrate-judge recommended granting the petition because under Ninth Circuit law, Crawford's request, made prior to jury empanelment, was timely unless it was made for the purpose of delay. The magistrate-judge found no evidence of the motion being made for the purpose of delay because the trial court never inquired into the issue. *See* App. E. The Warden filed objections. On January 15, 1992, the district court judge re-referred the matter to the magistrate-judge for the purpose of holding an evidentiary hearing unless the Warden conceded he had no evidence that Crawford's Faretta[1/] request was made for the purpose of delay. *See* App. D.

On March 17, 1992, the Warden filed an

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1. Faretta v. California, 422 U.S. 806 (1975).

affidavit from the trial judge who denied the Faretta motion stating that he denied the motion because it was untimely and it was made for the purpose of delay. Upon receipt of the affidavit, the magistrate-judge found that the affidavit contained no evidence that Crawford's Faretta request was made for the purpose of delay and recommended granting the habeas corpus petition. *See* App. C. Again, objections were filed to the findings. On May 5, 1992, the district court judge adopted the magistrate's recommendation and a judgment was entered granting the petition for writ of habeas corpus. *See* App. B. The Warden filed a notice of appeal on May 28, 1992.

On appeal the Warden argued that the timeliness of the Faretta motion was a matter of state procedural law and therefore was not an issue cognizable in federal habeas corpus proceedings. Furthermore, assuming a claim based on alleged untimeliness of a Faretta

request is cognizable in federal habeas corpus proceedings, the district court erred in ruling that Crawford's Faretta motion was not made for purpose of delay.

On August 20, 1993, the Ninth Circuit affirmed the district court's ruling citing Ninth Circuit precedent which holds that a Faretta motion is timely even if made on the morning of trial. Furthermore, the Ninth Circuit agreed with the district court's factual finding that there was no basis in the record for the state court to have found that the Faretta motion was made for the purpose of delaying the proceedings. *See* App. A.

REASONS WHY THE WRIT SHOULD BE GRANTED

The California Supreme Court and the Ninth Circuit Court of Appeals have developed conflicting rules regarding when a defendant's assertion of his right to self-representation becomes untimely and subject to the discretion of the trial court. This

question has been left unresolved by this Court since its decision in Faretta. Only a resolution of this issue by this Court will determine whether the Ninth Circuit is impermissibly interfering with matters that should be left to the states under the doctrine of federalism.

Moreover, there is also a need for this Court to address this issue because the circuit courts of appeals have conflicting views on the issue. Some follow the Ninth Circuit's rigid rule while others follow a more flexible rule like the California rule. Thus, the potential for overturning state convictions exists throughout the country due to the conflicting views on when a defendant's constitutional right to self-representation has been timely asserted.

Certiorari review by this Court is needed to allow the states to protect themselves against manipulation of the system by gamesmanship of defendants who trivialize the

Faretta right. This Court must clarify whether the Constitution permits states to regulate when a Faretta right has been timely asserted and what factors can be utilized in ruling upon an untimely request.

ARGUMENT

CALIFORNIA'S CRIMINAL PROCEDURAL RULE REGARDING THE TIMELINESS OF A REQUEST FOR SELF-REPRESENTATION COMPORTS WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE; THEREFORE, THE NINTH CIRCUIT COURT OF APPEALS IS WITHOUT AUTHORITY TO IMPOSE ITS OWN RULE UPON CALIFORNIA IN OVERTURNING CALIFORNIA CONVICTIONS

This Court's decision in Faretta v. California, 422 U.S. 806 (1975) established that an accused, in a criminal trial, has a constitutional right to represent himself. However, the Court left unresolved the issue of when a request for self-representation has been timely asserted. Consequently, the states and the federal courts of appeals have established their own procedural rules for the timely assertion of a Faretta request. In contravention of this Court's long standing tradition of deference to state criminal procedure, which was recently reaffirmed in Medina v. California, 112 S.Ct. 2572, 2576-81 (1992), the Ninth Circuit Court of Appeals has imposed its procedural rule

regarding the timeliness of a Faretta request upon California, which has a different procedural rule, in overturning a valid state conviction. Review by this Court is necessary to decide whether the Ninth Circuit's definition is mandated by the Constitution. If not, it is impermissibly interfering with the right of California to establish its own rules of criminal procedure.

In the eighteen years since Faretta, essentially two definitions of timeliness have evolved. There is the California flexible rule regarding the timeliness of a Faretta request. In order to invoke an unconditional right of self-representation, the defendant must assert the right "within a reasonable time prior to the commencement of trial." People v. Windham, 560 P.2d 1187, 1191 (Cal. 1977). A motion made after this period is addressed to the sound discretion of the trial court. People v. Burton, 771

P.2d 1270, 1275 (Cal. 1989). What is a reasonable time prior to trial will of course vary depending on the particular facts of each case. However, even when the motion for self-representation is not deemed timely under the rule, the trial court may still grant the defendant's request.[2/]

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2. As the California Supreme Court stated in People v. Windham, 560 P.2d at 1191 n.5:

> Our imposition of a 'reasonable time' requirement should not be and, indeed, must not be used as a means of limiting a defendant's *constitutional* right of self-representation. We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice. For example, a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated that he is not ready for

A more flexible approach like California's rule is followed by at least three circuit courts of appeals which hold

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> trial and needs further time for preparation. Thus if the reason why a defendant makes a request for self-representation in close proximity to trial is because he disagrees with his appointed counsel's desire for a continuance, some delay may be necessary whether or not the defendant's motion is granted. In such a case the very reason underlying the request for self-representation supplies a reasonable justification for the delayed motion. Furthermore, as defense counsel himself seeks a continuance for the purpose of further trial preparation it would be illogical to deny a motion for self-representation under such circumstances simply because the motion is made in close proximity to trial. There may be other situations in which a request for self-representation in close proximity to trial can be justified. When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. When, on the other hand, a defendant merely seeks to delay the orderly processes of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by a reasonable standard.

that, to be timely, the Faretta request must be asserted some time before "meaningful trial proceedings" have commenced. United States v. Merchant, 992 F.2d 1091, 1095 (10th Cir. 1993); Horton v. Dugger, 895 F.2d 714, 717 (11th Cir. 1990) (as the jury had been selected, the request was untimely); United States v. Lawrence, 605 F.2d 1321, 1325 n.2 (4th Cir. 1979) (request untimely because the jury had been selected). However, "[w]hen 'meaningful trial proceedings have commenced,' will, of course, vary from case to case, ..." Lawrence, 605 F.2d at 1325.

The Ninth Circuit has a more rigid rule under which a Faretta request is deemed timely as a matter of law if it is asserted prior to jury empanelment, so long as the request is not made for the purpose of delay. Only after this time period does the trial court have discretion to grant or deny the request. United States v. Schaff, 948 F.2d

501, 503 (9th Cir. 1991); Jackson v. Ylst, 921 F.2d 882, 888 (9th Cir. 1990); Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985); Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982).

The Ninth Circuit's definition of timeliness is followed by at least five other circuit courts of appeals. United States v. Jones, 938 F.2d 737, 743 (7th Cir. 1991); United States v. Betancourt-Arretuche, 933 F.2d 89, 96 (1st Cir. 1991); Chapman v. United States, 553 F.2d 886, 894 (5th Cir. 1977); United States v. Dougherty, 473 F.2d 1113, 1124 (D.C. Cir. 1972); United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965).

The practical conflict that exists between these two rules is exemplified by the instant case. Whenever a trial court exercises its discretion and denies a defendant's Faretta request prior to jury empanelment for a reason other than that the

defendant's request was made for the purpose of delay, the Ninth Circuit would automatically reverse the state conviction as an unconstitutional denial of a defendant's right to self-representation. However, California would allow the trial court to consider factors such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." Windham, 560 P.2d at 1191-92. The mere fact that the defendant did not request a continuance would not be determinative as to whether the trial court abused its discretion in denying his request for self-representation. People v. Hamilton, 710 P.2d 981, 988 (Cal. 1985).

Moreover, prior to jury empanelment, the Ninth Circuit places the burden upon the

state to demonstrate that the defendant's purpose in making the request was to secure delay. Fritz v. Spalding, 682 F.2d at 784. In California, when the defendant does not make the motion a reasonable time prior to the commencement of trial, and the matter is addressed to the sound discretion of the trial court, the burden is placed upon the defendant to show reasonable cause for the lateness of the request. Burton, 771 P.2d at 1276-77.

Thus, at the heart of the disagreement between the Ninth Circuit and California rules is the question about the point at which the defendant's right to self-representation stops being unqualified. In other words, is the Ninth Circuit's rule, making the Faretta right unconditional up through jury empanelment so long as the Faretta motion was not made for the purpose of delay, mandated as the minimum rule allowable under the Constitution?

Under our constitutional system, the primary responsibility for establishing procedures for criminal trials rests with the states. Payne v. Tennessee, 111 S.Ct. 2597, 2607 (1991). Thus, while recognizing that the Bill of Rights speaks in explicit terms to many aspects of criminal procedure, this Court has been reluctant to expand these constitutional guarantees under the open-ended rubric of the Due Process Clause because to do so would invite undue interference with both the legislative judgments and the careful balance the Constitution strikes between liberty and order. Medina v. California, 112 S.Ct. 2572, 2576 (1992). In fact, this Court has never felt that its decisions under the Due Process Clause establish it as a "rule-making organ for the promulgation of state rules of criminal procedure." Spencer v. Texas, 385 U.S. 554, 564 (1967).

Thus, in the area of criminal law, state

procedures that violate "fundamental fairness" have been narrowly construed. Dowling v. United States, 493 U.S. 342, 352 (1990). A state criminal procedure is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Patterson v. New York, 432 U.S. 197, 201-02 (1977).

In no way can the California definition of timeliness be so "fundamentally unfair" as to offend the traditions and conscience of our people. The criminal defendant himself knows when he want to act as his own lawyer. Thus, there is nothing unreasonable about requiring him to assert his request in a reasonable period of time prior to the commencement of trial proceedings so that he does not unjustifiably delay the scheduled trial or obstruct the orderly administration of justice. In the instant case, Crawford's

request was the result of a newly arisen dissatisfaction with counsel, which goes more to a request for a new lawyer, rather than to a request for no lawyer at all. Surely, Crawford's emotional reaction to the denial of his counsel's pre-trial motions should not serve as an excuse for a late Faretta request.

Moreover, a state procedure does not violate the Due Process Clause of the Fourteenth Amendment merely because reasonable minds may differ as to whether another method may "be fairer or wiser or give a surer promise of protection" to the defendant. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934.)

Thus, under the Due Process Clause, the Ninth Circuit has no authority to impose its definition of timeliness upon California, because this state's procedural rules with regard to the timeliness of a Faretta request are not "fundamentally unfair." And this is

true even if the Ninth Circuit's rule might be viewed as the preferable rule by a larger percentage of the circuit courts of appeals.

In order to stop the Ninth Circuit from perverting the Due Process Clause so as to force upon the states within its jurisdiction a rigid rule concerning when a Faretta request is deemed timely, it is imperative that this Court grant review. It should be noted that the state of Washington, which is also under the jurisdiction of the Ninth Circuit, follows California's flexible definition of timeliness. State v. Fritz, 585 P.2d 173, 177-78 (Wash.App. 1978).

Without an opinion of this Court finding the California definition to comport with due process requirements, the Ninth Circuit will continue to overturn valid state convictions whenever the trial court's exercise of discretion prior to jury empanelment does not affirmatively show that the defendant's purpose for making the request was for delay

of the proceedings. The undeniable cost of unnecessary reversals must be stopped.

Furthermore, this Court needs to prevent what is occurring in the Ninth Circuit from being repeated in other circuits because the potential for the same abuse exists elsewhere. For example, the Seventh and Second Circuit Courts of Appeals follow the Ninth Circuit's definition of timeliness. United States v. Jones, 938 F.2d 737, 743 (7th Cir. 1991); United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965). However, Indiana within the Seventh Circuit, and New York within the Second Circuit, follow the California rule. Russell v. State, 383 N.E.2d 309, 314-15 (Ind. 1978); People v. McIntyre, 324 N.E.2d 322, 327 (N.Y. 1974).

Therefore, in order to settle the question as to whether the California definition of timeliness comports with due process and thereby prevent the federal

courts from imposing their definitions upon state courts and overturning valid state convictions, petitioner prays that this Court grant certiorari review. Additionally, by this Court addressing the issue of whether California's procedural rule regarding the timeliness of a Faretta request is permissible under the Due Process Clause, states, at last, will have some guidance from this Court so they can establish their own procedural rules with confidence that they fall within permissible constitutional bounds.

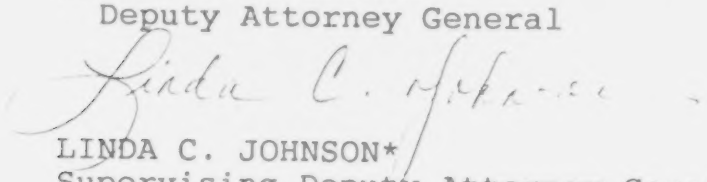
CONCLUSION

For the foregoing reasons, petitioner Ratelle respectfully requests that a writ of certiorari issue in this case to resolve the aforementioned conflict.

DATED:

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
CAROL WENDELIN POLLACK, Senior
Assistant Attorney General
DONALD E. DE NICOLA, Supervising
Deputy Attorney General
ARTHUR H. AUERBACH
Deputy Attorney General



LINDA C. JOHNSON*
Supervising Deputy Attorney General

ATTORNEYS FOR PETITIONER
*Counsel of Record

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES EDWARD CRAWFORD,	)	No. 92-55702
	)	
Petitioner-Appellee,	)	D.C. No. CV91-4851-HLH(S)
	)	
v.	)	
	)	MEMORANDUM[1/]
JOHN RATELLE, Warden,	)	
	)	
Respondent-Appellant.	)	
	)	

Appeal from the United States District Court for the Central District of California Harry L. Hupp, District Judge, Presiding

Submitted August 11, 1993[2/]

Before: PREGERSON, BRUNETTI, and RYMER, Circuit Judges.

California state prison warden John Ratelle appeals from district court's

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2. The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

judgment granting James Edward Crawford's pro se 28 U.S.C. § 2254 habeas petition challenging his convictions on the ground that the state trial court violated his right to self-representation. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

We review de novo the district court's decision to grant the habeas petition. Norris v. Risley, 878 F.2d 1178, 1180 (9th Cir. 1989). We review for clear error the district court's findings that the defendant's motion to proceed pro se was timely and that the state court's determination was not fairly supported by the record. Maxwell v. sumner, 673 F.2d 1031, 1035-36 (9th-Cir.), cert. denied, 459 U.S. 976 (1982).

A defendant in a state court criminal proceeding has the right under the Sixth and Fourteenth Amendments to represent himself. Faretta v. California, 422 U.S. 806, 807 (1975); Jackson v. Ylst, 921 F.2d 882, 888

(9th Cir. 1990). Absent an affirmative showing that the motion to proceed pro se is a tactic to secure delay, the motion is timely if made before the jury is empaneled. United States v. Schaff, 948 F.2d 501, 503 (9th Cir. 1991); Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985), cert. denied, 475 U.S. 1099 (1986); Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982). In a habeas corpus proceeding, a state trial court's factual findings are entitled to a presumption of correctness, 28 U.S.C. § 2254(d), unless the material facts are not adequately developed or the state court's "determination is not fairly supported by the record," 28 U.S.C. § 2254(d)(3) and (8).

Here, after Crawford's counsel unsuccessfully argued a motion to sever and a motion to strike a prior conviction, Crawford made an unequivocal request to proceed pro se

in a state court criminal proceeding.[3/] The request was made prior to jury empanelment and was not conditioned upon the granting of a continuance. The trial court, however, denied the motion as untimely because it was made on the morning of trial. Both the trial court and the state appellate court, in upholding the decision, made no finding as to whether the motion was a tactic to delay

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3. The following exchange took place:
MS. FALICK [Crawford's counsel to the court]: Mr. Crawford has just informed me that he was unhappy that the motions that I ran were denied by this court. So he thinks he can do a better job than I can and he wants to go pro per.

[THE COURT to defendant]: Is that what you want to do, sir,
you want to go pro per?

[Crawford]: Yes.

THE COURT: You want to represent yourself without any lawyer at
all?

[CRAWFORD]: Yes.

THE COURT: Today is the date set for trial. Court will find that motion not being timely, the motion will be denied.

trial. On petition for habeas, the district court ordered the magistrate judge to hold an evidentiary hearing on the issue of whether Crawford made the Faretta motion for the purpose of delay. The district court adopted the magistrate's findings and held that the record was barren of any evidence that Crawford's Faretta motion was made for the purpose of delay, thereby warranting the grant of the habeas petition.

Because Crawford's decision to proceed pro se was based upon his dissatisfaction in his counsel's argument on two motions made on the morning of trial, he could not reasonably be expected to have made the Faretta motion at an earlier time. See Fritz, 682 F.2d at 785 (whether the Faretta request could have been made at an earlier time is to be considered in determining whether the defendant had the purpose of causing delay). In addition, Crawford's Faretta motion did not include a request for a continuance. Cf.

Fritz, 682 F.2d at 784 (noting that a request for a continuance in conjunction with the Faretta motion would be strong evidence of a purpose to delay); Maxwell, 673 F.2d at 1035 (in accord). Finally, we have repeatedly held that the mere fact that the Faretta motion was made on the morning of trial does not require that it be denied as untimely. See, e.g., Fritz, 682 F.2d at 784 ("Any motion to proceed pro se that is made on the morning of trial is likely to cause delay; a defendant may nonetheless have bona fide reasons for not asserting his right until that time, ..."). Accordingly, we agree with the district court's factual finding that there is no basis in the record for the state court to have found that the Faretta motion was untimely. Because Crawford's request to represent himself was made before the jury was empaneled and because the record makes no affirmative showing of a tactic to secure delay, the district court properly

granted the petition. See id.; Schaff, 948 F.2d at 503; Armant, 772 F.2d at 555.[4/]

AFFIRMED.

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4. We reject appellant Ratelle's argument that the issue of whether a Faretta request is timely is not cognizable in federal habeas corpus proceedings. To the extent that Ratelle requests us to reconsider our cases providing for habeas review of a state court's determination concerning the timeliness of a Faretta motion, see e.g., Jackson, 921 F.2d at 888-89; Armant, 772 F.2d at 555-56; Maxwell, 673 F.2d at 1035-36, we note that a panel not sitting en banc may not overturn Ninth Circuit precedent. See Nichols v. McCormick, 929 F.2d 507, 510 n.5 (9th Cir. 1991), cert. denied, 112 S. Ct. 1226 (1992).

APPENDIX B

UNITED STATES DISTRICT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV91-4851 HLH (S) Date 5/5/92
Title Crawford v. Ratelle, et al.

DOCKET ENTRY

PRESENT:

HON. HARRY L. HUPP, Judge

Milli Borgarding
Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: Re order adopting Magistrate-Judges' second recommendation and tolling 120 day period on appeal.

ORDER (also, is applicable, findings and memorandum opinion):

The Magistrate Judge's second recommendation is adopted and the order is signed and filed

this date. In signing the order, the court adheres to the views set forth in its minute order of 1/15/92, which are incorporated herein. The court notes that the only additional evidence cited is the declaration of the Superior Court Judge who denied the Farretta motion that he concluded that the motion was made for purposes of delay. The opinion of the Superior Court judge is entitled to great respect, but it does not address the court's inquiry--what is the evidence on which the opinion is based. Thus, the opinion itself is irrelevant to the factual inquiry which this court must make. The court therefore concludes that Judge Stone is correct in determining that the record is barren of any evidence that the Faretta motion was made for purposes of delay. The result is that the habeas corpus petition must be and is granted.

However, the court notes that 9th Circuit law

is different than the rules that the state courts have been following and that there is some question that 9th Circuit law is consonant with the philosophy that the Supreme Court has been expounding (see minute order of 1/15/92). Thus, the court desires to give the Attorney General a chance to pursue the matter if he desires to do so. The 120 day period is stayed for 30 days to allow an appeal to be taken if the Attorney General be so advised. If an appeal is taken within 30 days, the 120 day period is further stayed until final determination of the appeal.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD CRAWFORD, Petitioner, v. JOHN M. RATELLE, et al., Respondents.	Civil No. CV 91-4851-HLH(S) SECOND REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN A STATE CUSTODY

This Report and Recommendation is submitted to the Honorable Harry L. Hupp, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b) (1) (B) and General Order 194 of the United States District Court for the Central District of California.

On December 19, 1991, a Report and Recommendation was filed by the Magistrate Judge recommending that judgment be entered granting relief to Petitioner. On January 9,

1992, objections were filed by Respondents. On January 13, 1992, after considering Respondents' objections, the Magistrate Judge adhered to the original recommendation. On January 15, 1992, the District Judge re-referred the matter to the Magistrate Judge for the purpose of holding an evidentiary hearing unless Respondents concede that they have no evidence that Petitioner's Faretta request was made for the purpose of delay. On January 16, 1992, the Magistrate Judge ordered Respondents to file and serve affidavits, declarations, and/or other documents, containing any and all evidence to be proffered in support of their position that Petitioner's Faretta request was made for the purpose of delay.

On March 27, 1992, Respondents filed an affidavit executed by the California superior court judge who presided at Petitioner's trial. In the affidavit, the trial judge stated the following:

> On June 12, 1989, the defendant made a motion to represent himself which I heard and thereafter denied.
>
> In denying the defendant's motion to represent himself, I determined the following:
>
> 1) The motion was made solely to delay the jury trial; and
>
> 2) The motion was not timely made.

No other evidence was presented by Respondents.

The Magistrate Judge finds that the affidavit of the trial judge contains no evidence that Petitioner's Faretta request was made for the purpose of delay.

RECOMMENDATION

It is recommended that an order be issued by the Court: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered ordering the release of Petitioner unless his case is set for retrial within 120 days of entry of judgment herein.

Date: April 10, 1992

R. M. Stone
ROBERT M. STONE
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV91-4851 HLH (S) Date 1/15/92

Title JAMES EDWARD CRAWFORD v. JOHN M. RATELLE, et al.

DOCKET ENTRY

PRESENT:

HON. HARRY L. HUPP, Judge

Milli Borgarding
Deputy Clerk Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: REFERENCE OF HABEAS CORPUS ATTER TO MAGISTRATE JUDGE FOR PURPOSE OF HOLDING EVIDENTIARY HEARING

ORDER (also, is applicable, findings and memorandum opinion):

The habeas corpus matter is re-

referred to Magistrate Judge Stone for

purpose of holding an evidentiary hearing for the reasons set forth below, unless Respondent concedes that it has no evidence that the Faretta request was made for purpose of delay.

This court agrees with Judge Stone's reading of the law and rejects the arguments advanced by respondent to the contrary. It plainly is the law in the 9th Circuit until overruled or reversed by an en banc panel or the Supreme Court that the exercise by a defendant in a criminal case of a Faretta right to represent oneself, first expressed on the day of trial prior to impanelling a jury, is timely and may only be denied if the purpose of the request is to delay trial. (Maxwell (9Cir'82) 673 F2d 1031, 1036; Fritz (9Cir'82) 682 F2d 782, 784; Armant (9Cir'85) 772 F2d 552, 555; cf. Schaff (9Cir'91) 948 F2d 501, 503.) Respondent argues that this rule should not apply, it is wrong, it is newly adopted, and that it is not in accord

with the California rule (see Burton (`89) 48 C3d 843, 258 CR 184). As the respondent must recognize, this court is bound by the constitutional views adopted by the 9th Circuit, no matter how wrong those views may be conceived to be. Thus, the court assumes that the respondent's argument is not really meant for this court, but is merely reserving the point for a possible en banc panel.

Whether the 9th Circuit's view, emphasizing as it does the subjective intention of the petitioner as the critical fact, is going to be the law of the future is in question, at least to this court. In the last 10 or 15 years, the Supreme Court has repeatedly emphasized objective reasonableness as the keystone factor to apply in deciding constitutional questions. Subjective intent has been severely downgraded as a relevant factor. The Supreme Court movement on this front has been so pronounced in so many areas that it seems

unlikely that a 9th Circuit test which emphasizes subjective intent as the critical factor will long survive (although it is noted that certiorari was denied in Armant --475 US 1099, 89 LEd2d 902).

Neither the Superior Court nor the state Court of Appeal found or concluded that petitioner's unqualified request to represent himself was motivated by an attempt to delay the trial. Neither did they conclude to the contrary. The Court of Appeal treated the question as an irrelevancy, relying on the Burton case test that granting or denying a Faretta motion at time of trial is discretionary with the trial court, and that one of the factors to consider in exercising the discretion is whether a continuance would be required (concluding that the underlying case had sufficient complexities that a continuance would certainly be required). Thus, the state Court of Appeal, applying California law standards, affirmed the

Superior Court's presumed exercise of discretion in denying the motion for self-representation. This result was flatly and directly contrary to the holding in Armant, which this court is bound to follow whether this court conceives that decision to be correct or not. The Armant decision held that whether a continuance would be necessitated by granting a Faretta motion is irrelevant; that if a continuance was required, it must be granted rather than denying self-representation unless the facts support a finding that the motion for self-representation was motivated by a purpose of delay. Since no such finding has been made in this case at any level, action must be taken by this court on the petition for habeas corpus.

The question remains as to what action must be taken. Judge Stone suggests that the writ be issued directly because he saw no indication in the record that the

self-representation request was made for purposes of delay. This court analyzes the case in a slightly different manner. It is true that there is virtually nothing in the record one way or the other that bears on the question of purposeful intent to delay. The reason for that is that the trial court made no inquiry one way or another to ascertain the facts. After being told that the petitioner wanted to represent himself, the trial judge merely said: "Today is the date set for trial. The court will find that the motion is not timely made, the motion will be denied." This was enough to get the conviction affirmed under the standards of Burton but plainly did not meet 9th Circuit standards. The court notes that procedurally, the norm is to have an evidentiary hearing in this court to determine factually whether the self-representation motion was made for purposes of delay (Fritz, supra). An exception exists

if the court is satisfied that there is insufficient evidence to justify an evidentiary hearing (Armant, supra). Judge Stone was obviously of the latter view. This is the only point of disagreement by this court with the recommendation. The very terse transcript from the Superior Court indicates only that petitioner was represented by a public defender, who lost a motion to sever and a motion to strike a prior conviction. The attorney then informed the court that "Mr. Crawford has just informed me that he was unhappy that the motions that I ran were denied by this court. So he thinks he can do a better job than I can and he wants to go pro per." To this court, the petitioner's reason is so irrational and so arbitrary that another motive than the one expressed seems a distinct possibility. It seems that if an expressed reason does not make much sense, another actual reason may be reasonably

suspected. At least there is plenty of room for further inquiry. Thus, the court concludes that an evidentiary hearing is necessary on the question of whether the Faretta request was, in fact, made for purposes of delay.

For the above reasons, the matter is referred again to the Magistrate Judge for the purpose of holding an evidentiary hearing on the question of whether the self-representation motion was made for purposes of delay. If the respondent can develop no evidence on that score sufficient to support a finding, then he should so inform Judge Stone to the end that the matter be transferred to this court for signing of the recommended order and judgment. The court notes an irony that might also be explored as part of the overall picture. After the self-representation motion was denied, the Superior Court was unable (presumably because of congestion) to get the case to trial for a

substantial period. The record available to this court is silent as to whether the Faretta motion was renewed or whether the Superior Court considered it when it became apparent that the trial would have to be continued.

A:914851.115

APPENDIX E

UNITED STATES DISTRICT

CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD CRAWFORD, Petitioner, v. JOHN M. RATELLE, et al., Respondents.	Civil No. CV91-4851-HLH(S) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted to the Honorable Harry L. Hupp, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner is a State prisoner. He was convicted in the California Superior Court of several counts of robbery, attempted robbery, grand theft, and related offenses. Petitioner was sentenced to a prison term of seventeen years and eight months.

On September 9, 1991, Petitioner's petition for a writ of habeas corpus was filed in this Court after transfer from another district. Petitioner alleges that he was denied his constitutional right to self-representation in the trial court.

DISCUSSION

Under the Sixth Amendment, a criminal defendant is entitled to waive his right to counsel and to represent himself if he knowingly, intelligently, and voluntarily elects to do so. Faretta v. California, 422 U.S. 806 (1975); United States v. Robinson, 913 F.2d 712 (9th Cir. 1990). But a request

for self-representation must be unequivocal, timely, and not for purposes of delay. Such a request is considered timely if made prior to jury selection, and if it is not made for the purpose of delay. United States v. Schaff, No. 89-30345, slip op. (9th Cir. Oct 24, 1991); Armant v. Marquez, 722 F.2d 552 (9th Cir. 1985); Fritz v. Spalding, 682 F.2d 782 (9th Cir. 1982). In order to justify denial of a request for self-representation, it is insufficient for the State to show that commencement of the trial would be delayed as a result of granting the request; an affirmative showing must be made that the defendant's purpose in making the request was to secure delay. Fritz v. Spalding, supra at 784.

On June 12, 1989, Petitioner's counsel argued a motion to sever and a motion to strike a prior conviction. Immediately following denial of the two motions, Petitioner made an unequivocal request to

represent himself:

> Petitioner's counsel [to the court]: `Mr. Crawford has just informed me that he was unhappy that the motions that I ran were denied by this court. So he thinks he can do a better job than I can and he wants to go pro per.
>
> [To Petitioner]: `Is that what you want to do , sir, you want to go pro per?
>
> Petitioner: `Yes.
>
> Counsel: `You want to represent yourself without any lawyer at all?
>
> Petitioner: `Yes.
>
> The court: `Today is the date set for trial. The court will find that motion not being timely made, the motion will be denied.' Augmented Reporter's Transcript (A.R.T.) at 12.

Petitioner's request was made before the jury was empaneled. Therefore, as a matter of law, it was timely unless made for the purpose of delay. There is no evidence

that Petitioner's request was made for the purpose of delay. The trial court never inquired into the issue.

The State appellate court upheld the trial court, essentially finding that because Petitioner's request was made on the day set for trial, and the case involved complex matters, granting the request would have required a continuance. But Petitioner did not seek a continuance and there is no evidence that one was required, or had been sought previously. Compare Fritz, 682 F.2d at 784 (defendant caused delay prior to request, and fact he was seeking another continuance "would be strong evidence of a purpose to delay"). Although a request for self-representation on the morning of trial is likely to cause delay, Petitioner could not have made his request earlier; grounds did not exist until his two motions were argued and denied.

In summary, the record does not

support Respondents' conclusion that Petitioner's request was made for the purpose of delay. Therefore, since the request was timely and unequivocal, Petitioner is entitled to have a new trial in State court.

RECOMMENDATION

It is recommended that an order be issued by the Court: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered ordering the release of Petitioner unless he is retired and convicted within 120 days of entry of judgment herein.

Dated: December 19, 1991

R. M. Stone
ROBERT M. STONE
United States Magistrate

APPENDIX F

JUDGMENT

UNITED COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55702
CT/AG#: CV-91-4851-HLH(S)

JAMES EDWARD CRAWFORD

Petitioner - Appellee

v.

JOHN RATELLE, Warden

Respondent - Appellant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District Court for the Central District of California, Los Angeles and was duly

submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 20, 1993

APPENDIX G

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES EDWARD CRAWFORD, Defendant and Appellant.	No. B044042 (Super. Ct. No. A740791)

James Edward Crawford appeals from the judgment entered following a jury trial in which he was convicted of two counts of first degree robbery and three counts of second degree robbery (Pen. Code, § 221), all with the use of a knife (now Pen. Code, § 12022, subd. (b)), attempted second degree robbery (Pen. Code, §§ 664/211), and grand theft from the person of another (Pen. Code,

§ 487, subd. 2) and a court trial in which he was found to have suffered a prior serious felony conviction (Pen. Code, § 667, subd. (a)). He contends: "The trial court abused its discretion and violated appellant's constitutional right to self-representation when it denied appellant's timely motion to proceed in propria persona."

Appellant does not challenge the sufficiency of the evidence. It will suffice to observe that the series of crimes of which he was convicted began on the evening of December 2, 1988, when he entered a residence and at knifepoint obtained the keys to a Cadillac automobile belonging to one of the occupants. Appellant was seen driving the Cadillac in connection with the remaining crimes, which he committed later the same evening, the following afternoon, and two days later.

On June 12, 1989, the day the matter was called for trial, appellant's counsel

argued motions to sever two counts of assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (b)), of which appellant was ultimately acquitted, and to strike the prior serious felony conviction on the ground of constitutional invalidity. After both motions were denied, the following colloquy ensued:

"[APPELLANT'S COUNSEL]: Mr. Crawford has just informed me that he was unhappy that the motions that I ran were denied by this court. So he thinks he can do a better job than I can and he wants to go pro per. [¶] Is that what you want to do, sir, you want to go pro per? [¶] [APPELLANT]: Yes. [¶] [APPELLANT'S COUNSEL]: You want to represent yourself without any lawyer at all? [¶] [APPELLANT]: Yes. [¶] THE COURT: Today is the date set for trial. Court will find that motion not being made timely, the motion will be denied."

Thereafter, the matter was trailed for a

witness check and was subsequently transferred to another court and, from there, to still another, where it was continued until June 16, 1989, because of another trial in progress. Trial commenced on June 16.

The contention the trial court abused its discretion in denying appellant's motion to represent himself is without merit. Although the court did not specifically question him as to his motivation (see People v. Windham (1977) 19 Cal.3d 121, 128), it had been apprised of his reason for wanting to proceed in pro. per. Nothing in the record suggests that inadequate representation by counsel was involved in the court's denial of appellant prior motions. The motion was made on the date set for trial, the case was a complex matter involving numerous counts, and a continuance would have been required to enable appellant to prepare his defense. (See ibid.; compare People v. Joseph (1983) 34 Cal.3d 936, 944.) Under the

circumstances, the court did not abuse its discretion in denying the motion. (People v. Burton (1989) 48 Cal.3d 843, 852-853; People v. Hall (1978) 87 Cal.App.3d 125, 130, 132.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

Klein, J.[5/]
KLEIN (Brett)

We Concur:

Gates, Acting P.J.
GATES

Fukuto, J.
FUKUTO

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5. Assigned by the Chairperson of the Judicial Council.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

_____

JOHN M. RATELLE, WARDEN, Petitioner,

v.

JAMES EDWARD CRAWFORD, Respondent

_____

PROOF OF SERVICE UNDER RULE 29.5(C)

I, F. MITCHELL, declare as follows:

I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013;

I served one copy of the PETITION FOR WRIT OF CERTIORARI in the above entitled case on each of the following persons:

James Edward Crawford, D-33875
R.J. Donovan Correctional Facility
480 Alta Loma Rd.
San Diego, CA 92179

United States Court of Appeals
450 Golden Gate
San Francisco, CA 94101

United States District Court
312 N. Spring Street
Los Angeles, CA 90012
Attn: Hon. Harry L. Hupp, Judge

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on December 16, 1993, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby have served all parties required to be served;

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16, 193 at Los Angeles, California.

_____

Declarant

F. MITCHELL